UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE C. COLEMAN, Petitioner-Appellant, vs. LAWRENCE E. WILSON, ET AL., Respondents-Appellees.	No. 22069

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code, section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code, section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Appellant was convicted on September 13, 1965, in the Superior Court of the County of Los Angeles, upon his plea of guilty, of two counts of first degree robbery

in violation of California Penal Code section 211. He was sentenced to state prison for the term prescribed by law, the sentences to run consecutively. People v. Willie C. Coleman, No. 304328 (CT 75). He did not appeal from this judgment. Subsequently, however, appellant filed applications for writs of habeas corpus in the Superior Court of San Bernardino County which were denied on November 15, 1965, and December 29, 1965, No. 129122. An application for writ of habeas corpus to the District Court of Appeal, First Appellate District, filed on January 3, 1966, was denied on January 5, 1966. Crim. 5490. His petitions for writ of habeas corpus in the Supreme Court of California were denied on March 22, 1966, Crim. 9827, and February 1, 1967, Crim. 10551. Following the application to the United States District Court discussed below, appellant, on October 18, 1966, filed for relief under Rule 31(a) in the District Court of Appeal, 2nd Appellate District. Relief was denied by that court on October 20, 1966, and his petition for hearing was denied by the Supreme Court of California on December 14, 1966.

B. Proceedings in the Federal Courts

On September 23, 1966, the United States Court for the Northern District of California denied appellant's application for writ of habeas corpus filed in that court, on the grounds that he had failed to exhaust state remedies

because he might have a right to a belated appeal under Rule 31(a), California Rules of Court, No. 45670. (CT 26). On December 15, 1966, a petition for rehearing was denied by the court for the same reason (CT 41-42). Following his unsuccessful petition for this relief in the California courts, as described above, the District Court, on February 10, 1967, entered its order denying relief on all grounds as alleged in the petition in case No. 45670, but granting appellant thirty days in which to amend his petition to reflect all facts surrounding his plea of guilty in relation to the voluntariness of this plea (CT 56-58). On February 23, 1967, appellant filed his amended petition, (CT 59-63), and the court issued an order to show cause (CT 65). Appellee filed a timely return, (CT 66-121), appellant filed a traverse (CT 121-34), and on May 25, 1967, counsel for respondent appeared before the court.

On June 7, 1967, the court entered its order denying the petition for writ of habeas corpus (CT 136-46). On June 28, 1967, appellant filed a petition for rehearing or, in the alternative, a petition for certificate of probable cause to appeal and leave to appeal in forma pauperis (CT 141-47). On July 7, 1967, the court denied the application for rehearing, and granted leave to appeal in forma pauperis (CT 149-50). Subsequently, appellant filed a motion to amend this petition (CT 151-57). Notice of appeal was filed on

July 18, 1967 (CT 158).

STATEMENT OF FACTS

In an information filed on July 23, 1965, appellant, Willie C. Coleman, and a co-defendant, Adolph Bonner, were charged with twelve counts of violations of the California Penal Code: section 187 (murder), count 1; section 211 (robbery), counts 2-7, 9-11; and section 209 (kidnapping for robbery with bodily harm), counts 8, 12. Petitioner was also charged with one prior felony conviction (CT 88-101).

Appellant was arraigned on May 27, 1965, while represented by a public defender, and entered pleas of not guilty (CT 103). On July 7, 1965, on appellant's motion, the public defender was relieved and Dan O'Neill was appointed to represent appellant (CT 104, 105). On July 12, 1967, counsel moved for dismissal of the charges pursuant to section 995 of the California Penal Code (CT 105). On July 29, 1965, the motion was granted as to count one (murder), and denied as to the other counts. (CT 105, 106).[1/]

On August 10, 1965, appellant and his co-defendant, each represented by counsel, withdrew their

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1. The murder charged was that of John Jeter, the third man involved in the robberies with appellant and his co-defendant, Bonner (See CT 88, 110, 112). Counsel succeeded in having the charges dismissed on the authority of People v. Washington, 62 Cal.2d 777 (1965) (decided on May 25, 1965), which changed the California felony murder doctrine (See CT 118).

pleas of not guilty to counts two and seven of the information and entered pleas of guilty thereto. Appellant also admitted the prior conviction charged (CT 107).

The transcript of these proceedings shows that Bonner was examined and entered his plea first (CT 109-10). The proceedings then continued with respect to appellant as follows:

"MR. O'NEILL: Now with respect to defendant Coleman, your Honor, I have counselled with him and advised him of his constitutional rights and have discussed the charges with him, have discussed with him the alternatives that are open to him in this matter. Mr. Coleman advises me that he desires to make his plea as to counts 2 and 7 of the Information in this case. He also tells me that he wishes to admit the allegations of prior conviction.

"THE COURT: Take the plea.

"MR. MC CORMICK: Your name is Willie C. Coleman, is that correct?

"DEFENDANT COLEMAN: Yes sir.

"MR. MC CORMICK: Mr. Coleman, you understand the charges that have been placed before you and brought you here to Court this morning, do you not?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: And you have discussed this matter with Mr. O'Neill, your lawyer?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: You have indicated, through him, that it is your desire at this time to plead guilty to two counts contained in that Information, the Information being number 304328, the counts being 2 and 7. Count 2 charges you with the crime of robbery and Count 7 charges you with the crime of robbery. Do you understand that?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: And it is your desire at this time to plead guilty to those two Counts, is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Mr. Coleman, you are doing that because you believe you are guilty of those two counts?

"DEFENDANT COLEMAN: Yes sir.

"MR. MC CORMICK: There has been no threats or promises made to make you plead guilty, have there?

"DEFENDANT COLEMAN: No.

"MR. MC CORMICK: You're doing it freely and voluntarily?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Willie C. Coleman, to Count 2 of the Information charging you with the crime of robbery, how do you plead?

"DEFENDANT COLEMAN: Guilty.

"MR. MC CORMICK: And to Count 7 of the Information, charging you with the count of robbery, how do you plead?

"DEFENDANT COLEMAN: Guilty.

"MR. MC CORMICK: Now Mr. Coleman, at the time of these robberies, there was with you a man named Jeter, is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: And he was armed with a shot gun at the time of these robberies?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Also, Mr. Coleman, there has been alleged that prior to the time you committed these robberies you were convicted of the crime of assault with the deadly weapon, a felony, in the Superior Court of the State of Arizona on the 10th day of May, 1957. That sentence was pronounced and you served a term of imprisonment therefore in the State Prison.

Do you admit that?

"DEFENDANT COLEMAN: Yes." (CT 111-13).

The court then found the offense to be first degree robbery, and at counsels' request, continued the case to September 13, 1965, for probation and sentence hearing (CT 110-11, 113).

On September 13, 1965, probation was denied, and appellant was sentenced to state prison for the term prescribed by law on each count, such terms to run consecutively. The remaining counts, two of kidnapping and seven of robbery, were dismissed (CT 75).

APPELLANT'S CONTENTIONS

1. Appellant was denied the effective aid of counsel.

2. Appellant's plea of guilty was involuntary.

3. Rule 11 of the Federal Rules of Criminal Procedure is binding on the State.

4. The fact-finding process employed by the District Court is clearly erroneous.

SUMMARY OF RESPONDENT'S ARGUMENT

I. The court correctly found on this record that appellant's plea of guilty was entered voluntarily while he was represented by competent counsel.

II. There was no error in the procedures used by the court to determine that appellant's plea was in fact voluntary; there are no substantial issues of fact to be resolved in an evidentiary hearing.

ARGUMENT

Appellant makes four contentions in his brief before this Court: (1) That he was denied the effective aid of counsel; (2) That his plea was involuntary; (3) That Rule 11 of the Federal Rules of Criminal Procedure is binding in the state; and (4) That the fact-finding process employed by the court was clearly erroneous.

Of these contentions, two are so clearly without merit they may be disposed of summarily. Appellant's first claim, that of lack of effective aid of counsel, is based primarily on his interpretation of section 3005 of Title 18 of the United States Code, which provides for the appointment of two attorneys, on request, in a capital case in the federal courts. This rule, of course, has no application to state procedure. Counsel was appointed for appellant as required by the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). His other "factual" allegations of effective aid of counsel relate to his claim of a coerced plea and will be discussed in that connection. Appellant's third claim, relating to the application of Rule 11, Federal Rules of Criminal Procedure, may also be dismissed summarily. Again, the rules are applicable to federal criminal procedure, not to state procedure. Rule 1, Fed. Rules Crim. Proc.

Since appellant's other contentions, although equally without merit, are not patently erroneous on their

face, more extensive argument is presented.

I

THE COURT CORRECTLY FOUND ON THIS RECORD THAT APPELLANT'S PLEA OF GUILTY WAS ENTERED VOLUNTARILY WHILE HE WAS ADEQUATELY REPRESENTED BY COUNSEL.

In his application, appellant alleged that his pleas of guilty to two counts of armed robbery were involuntary due to coercive pressures: the representations of his attorney that he would receive probation and that a deal had been made with the district attorney to dismiss all other charges; an unjustifiable fear of the death penalty instilled to coerce the plea; lack of knowledge of the consequences of his plea; and the threat of his attorney to withdraw if appellant did not plead guilty.

These allegations are either factually untrue, as shown by the record, or legally without merit. The statements of counsel and appellant at the time the plea was taken show beyond question that the plea was voluntary. As set forth in the Statement of Facts, supra, the record shows that counsel informed the court that he had advised appellant of his constitutional rights, that he had discussed the charges with him, and had informed him of the alternatives available.

The prosecutor, at the direction of the court, then questioned appellant, asking him if he understood the charges,

and if he had discussed them with his attorney. To both questions appellant replied yes. He was then informed that the charges to which the guilty pleas were to be entered were two charges of the crime of robbery, and asked if he understood, he answered that he did. The prosecutor then asked if he desired to enter his plea and if he were doing so because he believed he was guilty. Again he answered yes to both questions. When asked if any threats or promises had made him plead he answered no. Finally, the prosecutor asked if he were entering the plea freely and voluntarily. He replied yes. These questions and answers were given in open court. There was not the slightest indication by petitioner that he had been threatened in any way, and his co-defendant, in the presence of his own counsel, had been questioned and had responded in much the same way.

We submit that on this record appellant's allegations that he was threatened or uninformed cannot be seriously considered to raise any factual issue requiring further consideration.

Appellant attempts to evade the facts of the record by arguing that because a bargain was in fact made and the record does not show this, that the plea was involuntary. However, the law is clear that the fact that a plea was entered pursuant to a bargain does not invalidate the guilty plea. Gilmore v. California, 364 F.2d 916 (9th Cir.

1966); Cortez v. United States, 337 F.2d 699 (9th Cir. 1964). As the court pointed out in Cortez, a guilty defendant must always weigh the possibility of his conviction on all counts and the possibility of his getting the maximum sentence, against the possibility that he can plead to fewer or lesser offenses and perhaps receive a lesser sentence. Id. at 701.

An examination of the entire record on plea taking indicates the obvious: the reason no mention was made of the agreement was because it was unnecessary. Everyone understood the implications of the entry of a plea of guilty on only two counts of an eleven count information. The court did not set a trial date, but a sentencing date. The procedure followed was the usual one, and the questions were asked to make sure the defendants had not been threatened or promised leniency.[2/] Thus, appellant's allegations that he was promised probation and that his attorney threatened him are directly refuted by the record. Furthermore, even if there is a remote possibility of a misunderstanding by appellant of the meaning of "promises" and thus this is why he failed to inform the court, the expectation of leniency does not invalidate the plea. Gilmore v.

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2. The question asked the co-defendant Bonner shows this more clearly: "There have been no promises of reward or lesser sentence or probation or anything . . . ." (CT 109).

California, supra; Pinedo v. United States, 347 F.2d 142 (9th Cir. 1965).[3] Appellant also alleges, however, that his attorney gave him 24 hours to decide to plead guilty, and said he would not represent him if he did not. Since by appellant's own statement this "threat" was made 24 hours before trial, the first statement if made was accurate. The second, in view of the fact appellant had already had two different attorneys appointed, is frivolous. Appellant not only stated in open court that he was not threatened, but does not explain how he could have misunderstood the import of the word "threats" when questioned by the Court.

Appellant's principal argument as to how he was "coerced" into entering his guilty plea is that he was under an "unjustifiable" fear of the death penalty instilled to force him to plead guilty, and that because of this fear he was deprived of the ability to communicate with counsel. Under California law, appellant faced a mandatory penalty of either death or life without possibility of parole if he had been convicted of either of the two kidnapping charges.

Appellant, however, argues that this is immaterial

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3. It should also be noted that appellant did not mention this promise in his petition before the California Supreme Court (CT 76-87), nor does he allege that he questioned the prison sentence at the time it was imposed.

because he was afraid for his life because of the murder charge which was dismissed. The record shows that counsel, now under attack for the inadequacy of his representation, succeeded in getting this charge dismissed on July 29, 1965, pursuant to his motion of July 12, 1965. The record shows that petitioner was present on both dates (CT 105, 107).

Fear of the death penalty on the kidnapping charge does not invalidate the plea. The fact that a defendant is confronted by a hard choice and chooses the lesser of two evils does not make his plea of guilty involuntary. Gilmore v. California, supra. Furthermore, to permit a defendant subsequently to attack his plea on such a basis would have the anomalous result of forcing the defendant to trial to face the death penalty of which he was so afraid because the plea which would relieve his anxiety and possibly save his life could not be taken.

In the instant case, by pleading to the two counts of robbery, appellant eliminated the possibility of receiving the death sentence and achieved the possibility of eventual parole. A review of the record of the preliminary examination, available to and considered by the court below, shows that his conviction on these charges was a virtual certainty.[4] The advice of counsel as to the relative issues involved would be grounds for reversal only if his assistance

4. This transcript has been lodged with the court.

to the defendant is "of such a kind as to shock the conscience of the court and make the proceedings a farce, and a mockery of justice." Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967). This is obviously not the case here.

Finally, appellant alleges that he was not advised of, and was unaware of the consequences of entering a plea, and that the inadequacy of counsel is further shown because no investigation was made of the possible defenses.[5] On this record, such allegations are patently frivolous. Defense counsel informed the court that, "I have counselled with him and advised him of his constitutional rights and have discussed the charges with him, have discussed the alternatives that are open to him in this matter." Appellant now asks this Court to believe that not only did he lie to the Court when he said that he had not been threatened, that his plea was voluntary, and that it was entered because he believed he was guilty, but that counsel also lied to the Court.[6] Even appellant admits that he was informed by counsel

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5. This latter allegation was first made in the traverse, and was based on the fact that counsel in his affidavit had not made an affirmative showing that he had done so. Such conclusionary allegations are entirely insufficient to raise an issue of incompetence of counsel. See Dalrymple v. Wilson, 366 F.2d 183 (9th Cir. 1966).

6. The same information was given to the court by counsel for Bonner who also entered a plea of guilty to the same two charges. That counsel had consulted with each other is not contested by appellant. Thus, we must believe that both counsel were inadequate in giving this advice.

of the penalty for the kidnapping charges made. If he realized that probation would be a deal, he must have been aware that prison was the alternative. Under California law, the term for robbery is indeterminate and was impossible to predict. Thus, we are left with the only possible remnants of his allegation: he did not know the maximum penalty was life. To consider this allegation seriously as the basis for finding an involuntary plea, particularly in view of counsel's affidavit, would make a mockery of the function of the federal courts in protecting the rights of prisoners through habeas corpus.

In order to foreclose the most remote possibility that any substantial factual issue could be raised in the face of this record, appellee obtained, and the court considered, the affidavit of Mr. Dan O'Neill, appellant's defense counsel (CT 118-21). This affidavit, consistent with and in support of the record, shows beyond question that no factual issue exists which would require a further evidentiary hearing to establish that the plea was voluntary and that counsel was adequate.

II

THERE WAS NO ERROR IN THE PROCEDURES USED BY THE COURT TO DETERMINE THAT APPELLANT'S PLEA WAS IN FACT VOLUNTARY: THERE ARE NO SUBSTANTIAL ISSUES OF FACT TO BE RESOLVED IN AN EVIDENTIARY HEARING.

Appellant argues that the court erred by not

holding an evidentiary hearing because the court could not consider an affidavit to make findings of fact where the facts were in conflict. Appellant misunderstands both the function of the court in habeas corpus proceedings and the consideration the court gave to counsel's affidavit in making its findings of fact.

A federal district court has the power to order an evidentiary hearing where it is necessary to decide issues of fact bearing on the constitutionality of the prisoner's detention. Where the court can determine on the basis of the records before it that there are no issues of fact, it need not order such a hearing. Townsend v. Sain, 372 U.S. 293, 312 (1963); Brown v. Allen, 344 U.S. 443, 460-61, 464 (1953). Thus, a Federal District Court may deny an application without an evidentiary hearing, where the record affords an adequate opportunity to do so.

In making this determination, it has been held that the court may not decide substantial disputed issues of fact solely on the basis of ex parte affidavits. Walker v. Johnson, 312 U.S. 275 (1940); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964). It is, however, clear that the district courts have discretion to use affidavits to determine whether any substantial factual issues exist. Copenhaver v. Bennett, 355 F.2d 417, 421 (9th Cir. 1966). Such was the use made of

the affidavit of counsel in the instant case.[7/]

The record in the case, and appropriate inferences to be drawn from it, directly refute appellant's assertions in all important aspects. The only assertion made by appellant which is not legally irrelevant or directly contradicted by the record, including his own statements to the court, is his claim that he was not informed that the maximum possible penalty for first degree robbery is life imprisonment, and even this may be inferred from the record. We submit that such an allegation, inconsistent with the entire tenor of the record, is not sufficient to raise a substantial issue of fact. To hold otherwise would mean that the district courts would be faced with the possible task of providing a de novo federal hearing on every guilty

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7. Because this case is so clearly not within the rationale of Walker v. Johnson--no substantial issues of fact were decided solely on ex parte affidavits--we need not reach the issue of the extent to which the case has been overruled by the subsequent changes in the statute. In Walker v. Johnson, the Supreme Court did not purport to establish a constitutionally based rule relating to affidavits but was interpreting the statute in effect at the time, which provided that the court shall proceed "to determine the facts of the case, by hearing the testimony and arguments. Id. at 285. There is, of course, no Sixth Amendment problem of confrontation involved. The statute was subsequently amended and a section added which provides: "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. . . ." 28 U.S.C. § 2246. See also, 28 U.S.C. § 2245 (certificate of judge).

Thus, evidence may be taken by affidavit to resolve, presumably, even substantial issues of fact. A fortiori, an affidavit may be used, as in the instant case, to establish that no substantial issues of fact exist.

plea entered in either state or federal courts.[8/]

Moreover, not only is the allegation inconsistent with the record but it is also contradicted by the affidavit of his trial counsel. Viewed in context then, appellant's allegation is contradicted by virtually its only possible source of support. That the District Court under these circumstances determined that no factual issue requiring further inquiry had been presented constituted a proper exercise of the discretion available to it.

An affidavit by defense counsel is a particularly appropriate one for use in such a case. Realistically, appellant could not hope to establish his case without supporting testimony from counsel, and even then, it might not be sufficient. Cf., Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966). However, an affidavit from defense counsel supporting appellant's allegations might, in this instance, have raised issues substantial enough to require a further hearing.

To the extent that minor "disputed" issues of fact, such as the information on penalties given by counsel, was resolved on the basis of the affidavit, we submit this

8. The magnitude of the possible burden has been recognized by the Supreme Court. See, Townsend v. Sain, supra, at 319: "We are aware that the too promiscuous grant of evidentiary hearings on habeas could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their permanent responsibility in this area.

is an entirely proper use of an affidavit. The court in Walker held only that substantial disputed factual issues may not be decided solely on the basis of ex parte affidavits. Here, no substantial issue was involved and both the record and counsel's consistent and supplementary statement contradicted the claim, as pointed out by the court below in its opinion. The record supports the finding of voluntariness; the affidavit of counsel is supplementary to the record and removes any possibility that appellant could provide persuasive support for his factual allegations.

Moreover, this use of an affidavit by defense counsel prevents the possible serious consequences to the representation of criminal defendants by competent counsel ethically obligated to give objective and impartial advice. If counsel is to be subjected to an evidentiary hearing attacking his integrity and competence on the basis of such patently frivolous allegations, it will be increasingly difficult for him to make a choice without considering a possible future attack on his professional reputation. Those who will ultimately be the losers are the criminal defendants whose rights the writ of habeas corpus is designed to secure. Cf., Kuhl v. United States, 370 F.2d 20 (9th Cir. 1966); Nelson v. California, 346 F.2d 73 (9th Cir. 1965).

It was noted by the court in the Copenhaver case, supra, that "discretion and flexibility of approach are

essential if the courts are to continue to effectively carry out the great purpose of this writ." Id., at 421.

The court continues with a quotation from Sanders v. United States, 373 U.S. 1, 9 (1963):

> "[E]ach application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational hearing on the propriety of the discharge sought." [quoting from Salinger v. Loisel, 265 U.S. 224, 231 (1924)].

On the basis of this record, it is clear there was no abuse of discretion, that no rational purpose would be served by taking further evidence, and that the finding of the trial court is fully supported. As the court stated:

> "On review of the entire record, it is clear that petitioner was ably represented, that the advice given by counsel was sound, and that it achieved for petitioner what appears to be the best result possible in the circumstances. Petitioner's responses were made in open court, were clear and unequivocal, and gave no indication of any duress or lack of understanding. The Court finds, therefore, that petitioner's plea was not coerced, and that he was adequately represented by counsel." (CT 146).

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus be affirmed.

Dated: November 16, 1967.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 16, 1967.

Gloria F. DeHart

GLORIA F. DeHART
Deputy Attorney General